



**COMPETITION COMMITTEE**

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS  
IN DENMARK**

**2003**

**Contents:**

I. CHANGES TO COMPETITION LAWS AND POLICIES, PROPOSED OR ADOPTED.....	3
2. ENFORCEMENT OF COMPETITION LAW AND POLICIES .....	4
3. THE ROLE OF COMPETITION AUTHORITIES IN THE FORMULATION AND IMPLEMENTATION OF OTHER POLICIES.....	7
4. RESOURCES OF THE COMPETITION AUTHORITY .....	9
5. REFERENCES TO NEW REPORTS ON COMPETITION POLICY .....	9

## **1. Changes to competition laws and policies, proposed or adopted**

### ***1.1 Summary of new legal provisions of competition law and related legislation***

1. 2003 was a quiet year with respect to new legislation. The 2002 change of the Danish Competition Act brought the legislation up to date by, among other things, increasing the level of penalties and giving the courts the option to be lenient with co-operating companies. On the legislation front 2003 was used to prepare for the large changes that will take place in relation to the modernised European Competition Rules.

2. The modernised EU rules come into force on 1 May 2004, and that means, among other things, that companies can no longer report agreements to the Commission. This reform does not change the basic European competition rules but merely the rules of procedure governing the use of the competition rules. Nevertheless, the reform is expected to have a major impact on how the rules are implemented in practice. The objective is that the authorities work more efficiently for the benefit of companies and consumers all over Europe.

3. With the introduction of these new rules, companies will no longer be able to report their agreements to the Commission but are required to assess their agreements themselves. The practice of the last 30 years will prove useful, but the role of the Competition Authority will also change, playing an even greater part in guiding and advising companies.

4. At the same time, the reform means that the Competition Authority and the other national competition authorities will be dealing with some of the cases that the Commission currently deals with. Seen from the point of view of enterprises, the advantage is that the national competition authority has presumably greater knowledge of and insight into local market conditions.

5. Conversely, it releases resources in the Commission to focus its efforts on the major infringements that have a crucial impact on the competitive conditions. The investigation of cartels will be intensified and the Commission will concentrate its resources on significant cases.

6. The introduction of this new practice is undoubtedly one of the greatest challenges facing the Competition Authority in 2004.

## 2. Enforcement of competition law and policies

### a) Enforcement statistics

7. The Competition Council decided 21 major cases in 2003. The Competition Authority made 74 decisions in important cases with subsequent publication. In 2003, the authority also concluded about 769 minor cases, mainly concerning access to documents, questions from citizens, etc.

8. Decisions of the council and the authority can be appealed to the Competition Appeal Tribunal. 15 cases were decided in 2003. Of these, 4 were overruled or referred back. Decisions of the Appeal Tribunal can be brought before the courts. In 2003, the court system made 3 rulings in relation to competition.

	01.01.03 – 31.12.03
Cases appealed	15
Competition Council decisions upheld or appeals withdrawn	11
Competition Council decisions overruled or referred back	4

9. On April 1<sup>st</sup> 2004, 7 cases were pending before the Appeals Tribunal.

### b) Significant cases

#### Court rulings

#### Supreme Court judgement on the EU Commission's control investigations

10. In August 2001, the EU Commission decided to carry out a control investigation at a Danish company and its subsidiaries. The reason given was the Commission's suspicions that the company had participated in illegal cartel agreements. In accordance with this decision, the Competition Authority requested that the District Court ordered that representatives from the Authority and the Commission should be given access to carry out a control investigation at the company without notice. On the same day, the District Court made an order allowing the investigation, which was immediately initiated. The company appealed the order to the High Court, which dismissed the appeal, and the case was then brought before the Supreme Court. On 28 March 2003, the Supreme Court upheld the decision of the High Court. The company questioned, that the search warrant obliged the company to assist the authorities by handing over internal documents and supplying oral information. The High Court affirmed that the warrant was valid, and that the legal protection against self-incrimination had not been violated.

#### High Court Judgement on binding resale prices

11. In 2002, the Copenhagen City Court ordered a company to pay a fine of DKK 200,000 for having breached the ban of the Danish Competition Act against fixing binding resale prices. The order was appealed to the High Court by both the company and the Public Prosecutor for Serious Economic Crime. In October 2003, the High Court acquitted the company. Thus, the High Court found that it had not been proved that the company had breached the ban of the Competition Act against fixing binding resale prices.

### *Punishable infringements of the Competition Act*

#### Cartels

12. Cartels represent one of the most obstructive types of anti-competitive behaviour. Investigation and inquiry into such activities are therefore given a very high priority by the Competition Authority. Investigations into both cartels and other matters concerning punishable infringement of the Competition Act are generally based on information received by the authority from companies and the public by way of complaints, inquiries, etc. However, the authority also collects information as part of its general market monitoring and case handling work. In some cases, these efforts reveal illegal cartel activities, etc.

13. Until now, the largest cartel disclosed on the Danish market is the bid rigging cartel in the electric wiring service, mentioned in the Annual Reports for 2001 and 2002. The criminal prosecution of companies in the electricity cartel was practically brought to an end in 2003. By the end of 2003, 204 companies had been fined a total of DKK 25.6 million in this case.

#### *Other punishable types of infringement*

14. Not only actual cartel agreements infringe the Competition Act. Also other anti-competitive agreements and behaviour, e.g. binding prices and abuse of dominant position, have a significant, harmful impact on society and the consumers. Consequently, the Competition Authority also attaches great importance to clearing up of and investigation into such violations.

15. In 2003, criminal prosecution of a ferry company, which had been reported to the Public Prosecutor for Serious Economic Crime by the Competition Authority, was finalised. A penalty of DKK 1,700,000 was imposed on the company for having made illegal exclusive agreements with bus companies.

#### Higher penalties in the future

16. The penalties for infringement of the Danish Competition Act will be increased significantly in the future according to the 2002 change of the Act.

17. In connection with future fixing of penalties, the seriousness and duration of the infringement will be considered. Instances of infringement of the Competition Act are divided into three groups with the following basic amounts:

- Less serious infringement: from DKK 10,000 to DKK 400,000
- Serious infringement: from DKK 400,000 to DKK 15 million
- Very serious infringement: from DKK 15 million

18. The penalty levels are guidelines for the courts. When fixing the penalties, the courts also have to consider the particular company's ability to pay. Besides, the courts are to consider any aggravating or extenuating circumstances that may influence the penalty, for example, if a charged or accused party has played a particularly active role in a cartel, or a company has made and still makes an active effort to get all relevant employees to comply with the legislation through a so-called compliance programme.

#### *Decisions*

19. The Competition Council decides on major cases and test cases. The Competition Authority manages the day-to-day administration of the Act and the preparation of cases to be submitted to the

Council. On behalf of the Council, it decides cases in accordance with practice or in accordance with guidelines set out by the Council.

#### Anti-competitive agreements

##### Arrangement agreements between Realkredit Danmark and estate agents

20. The Competition Council approved a number of arrangement agreements that Realkredit Danmark wanted to make with local estate agents in Denmark. The agreements concerned, among other things, the fixing of commission and sales targets when estate agents outside the Home chain arrange loans with Realkredit Danmark. The problem with the agreements was that the commission level could increase when an estate agent arranges several loans. This could result in a restraint on free competition.

21. However, the agreements did not conflict with the Competition Act, as they related to a modest part (a small percentage) of the market, and they did not prevent estate agents from arranging loans on behalf of other mortgage banks than Realkredit Danmark. All the same, the Competition Council decided that the commission fees should be published, as increased transparency in relation to these fees would promote the competition among the intermediary lenders. Realkredit Danmark appealed this part of the decision, but it was later upheld by the Competition Appeal Tribunal.

##### Retailer terms for foreign booksellers

22. The Competition Council ordered two Danish book distributors, DBK-bogdistribution and Nordisk Bog Center, to change their retailer terms. The distributors were not permitted to demand that foreign booksellers observed the fixed prices if they sold the books to consumers in Denmark.

23. In Denmark, the book industry is permitted to have fixed prices on books during the calendar year in which they were published as well as the following calendar year. Thus, Danish publishers are permitted to set fixed prices on books that Danish booksellers are obliged to observe.

24. On behalf of the Danish publishing houses, DBK-bogdistribution had refused supplying books to a bookseller called Hamrelius in Malmö, because the bookseller refused to sign a document stating that he would observe the fixed prices if he sold books in Denmark. The industry feared that the fixed prices in Denmark could be bypassed, if the bookseller was permitted selling the books at free prices to the consumers in Denmark, e.g. via mail order or telephone sale.

#### Abuse of dominance

25. According to the Danish competition Act, it is prohibited to abuse a dominant position. The question of whether an undertaking is dominant is of course contingent upon the definition of the relevant market. Consequently, in some cases it might be difficult for an undertaking to assess whether or not the undertaking is dominant on the relevant market. Therefore a special provision has been included in the competition Act, whereby the Competition Council upon request must declare, whether one or more undertakings have a dominant position. If the Competition Council declares that an undertaking does not have a dominant position, this decision is binding, until revoked by the Competition Council.

##### TDC's price on broadband

26. The Competition Council decided on the evidence that TDC had not offered ADSL connections at prices below TDC's costs. Thus, TDC had not abused its dominant position on the market.

27. A number of TDC's competitors stated that TDC had dumped the prices, squeezing the competitors out of the market. For that reason, the Competition Authority investigated whether TDC offered ADSL at prices below the average total costs of the company.

28. The Authority's investigation showed that TDC had been conducting an aggressive price policy. However, TDC had covered all its costs, and with the aid of its aggressive price policy, TDC had succeeded in increasing its share of the ADSL market to 80% by extending its customer base, among other things. In this way, TDC had achieved economies of scale that its competitors were unable to match. This was the most important reason why TDC – unlike its competitors – had been able to offer ADSL at low prices while still recovering its costs.

#### Mergers and acquisitions

29. Merger control was incorporated in the Danish Competition Act in 2000. In 2003, the Competition Authority dealt with 11 merger cases. The largest merger case in 2003 was Nykredit's acquisition of Totalkredit creating the largest mortgage bank in Denmark.

30. The threshold value for mergers in Denmark is DKK 3.8 billion. The Competition Act includes a special provision on mergers not found in any other country. According to this provision, the parties may obtain a preliminary approval, which is not published until at a later agreed time. This provision may in some negotiations be expedient for the parties – and is naturally only applied in cases where it is completely clear that the merger will have no impact on competition.

#### Nykredit's acquisition of Totalkredit

31. The Competition Council approved the merger between Nykredit and Totalkredit after significant changes had been made. The changes fell into three groups.

32. Firstly, the term of the agreement was halved. The parties had agreed that Nykredit should have more or less exclusive access to the 106 Totalkredit owners' distribution network for a period of at least 9 years. This was amended so that the most anti-competitive parts of the agreement had a term of only 4 years, whereas the parts of the agreement posing less restraint on free competition had a term of 6 ¼ years. In this way, both parties would have the opportunity of finding a more effective business partner after a few years, in the event that either or both of them wanted to.

33. Secondly, the changes brought about a commitment from Nykredit that a proportion of the efficiency gains from the merger would benefit the consumers directly. Nykredit's interest margin for new loans was lowered by more than 5% and a discount of DKK 600 was introduced for consumers applying for loans online.

34. Nykredit also introduced free registration of bonds. In total, the Nykredit's commitments facilitated annual savings for the consumers in excess of DKK 100 million. Thirdly, the transparency was increased in several ways. The arrangement commissions for mortgages would be published in future, and Nykredit would make it easier for the consumers to buy and sell bonds.

35. The Competition Council then decided that the positive impact of Nykredit's commitments compensated for the negative effects of the merger, and that competition had not suffered.

### **3. The role of competition authorities in the formulation and implementation of other policies**

36. In principle, the Danish Competition Act seeks to achieve the greatest possible equality between private and public business activities. If anti-competitive practice is a direct or necessary consequence of a

public regulation, the provisions of the Act do not apply. The assessment of this - which entails putting other legislation above the Competition Act - can only be made by the relevant minister who is answerable to the Danish Parliament. The minister responsible and the Minister of Economic and Business Affairs must motivate governmental restrictions on competition questioned by the Competition Authority.

37. A special feature of the Danish competition act is, that The Competition Council may issue orders for the termination or repayment of aid granted from public funds, which has been granted to the benefit of specific forms of business activities, and which is not legitimate according to public regulation. This provision should be seen as a supplement to the EC state aid rules. This means that the Competition Council can intervene if the aid is not legal pursuant to statutory regulation and if it distorts competition. This also applies if public authorities sell or let land, commercial tenancies, etc. below market prices.

#### ***Request to the Minister of Environment regarding the returnable deposit scheme***

38. In a request to the Minister of Environment, the Competition Council recommended that the regulation of the returnable deposit scheme and the recycle scheme for beer and soft drinks in non-returnable packaging was changed.

39. The Council argued that it was regrettable that the shares in Dansk Retursystem are owned by the major breweries. The company operates an infrastructure that is crucial for all suppliers of beer and soft drinks, and the ownership provides the shareholders with influence on the operation. As a consequence, the Council recommended to the Minister of Environment that the operation of the returnable deposit scheme and the recycle scheme was made independent of industry interests. This will become possible in 2008 when Dansk Retursystem's monopoly expires.

40. The collection of non-returnable packaging will again be put up for tender in spring 2004. The Council recommended that future tenders will prevent suppliers of beer and soft drinks from collecting from locations where they are not already permanent suppliers of beer or soft drinks.

41. In addition, the Competition Council recommended that initiatives were made to establish a common returnable deposit scheme and recycle scheme within the EU.

42. The Council further recommended reducing the administrative burden on importers etc. and introduce the possibility of exemption for new packaging to be used exclusively for restaurants and the like, creating the opportunity to test new types of beer.

#### ***Letter to the Danish Minister of Defence regarding the pilotage sector (November)***

43. In a letter to the Danish Minister of Defence, the Danish Competition Council recommended that the rules on pilotage and pilotage authorisation were changed, opening the sector to competition.

44. The Danish Competition Authority had examined the efficiency and the competition within the pilotage sector and had concluded that the resources of the sector were not being effectively utilised. Increased competition may mean that a greater number of the major ships may make use of pilotage services, increasing the safety of Danish waters and of the environment.

45. The insufficient utilisation of resources within the Danish pilotage sector is, first and foremost, due to a lack of pressure of competition. Thus, the sector is regulated in such a way that the use of pilotage services is encouraged, but it does not ensure the efficient utilisation of e.g. boats and crews. In addition, the rules on pilotage have resulted in a division of the market between the existing pilots, heavily restricting competition, the improvement of efficiency and a reduction in the price on pilotage.

46. As the regulation is prescribed by law, the Danish Competition Council cannot intervene pursuant to the Danish Competition Act. Instead, the Council used the opportunity to contact the Minister of Defence directly. In the letter, the Council presented a proposal to solve the competition problems in full consideration of e.g. reliability of supply as well as training and safety requirements.

#### 4. Resources of the Competition Authority

##### 4.1 Total resources

a) Annual budget 2003: DKK 88 million = EURO 11.7 million; (2002: 93 million = EURO 12.4 million)

	Competition Authority (in total) in 2003	Employees occupied with competition law in 2003
<i>Economists</i>	38	27
Lawyers	28	21
Other professionals	21	17
Support staff	38	20
Total	125	85

- 40 person-years, which are not allocated to administration of the Competition Act, are allocated to the following:
- 10 person-years: public procurement and state aid
- 30 person-years: energy price regulation

##### 4.2. Period

47. The information is as of the 1<sup>st</sup> of December the year in question.

#### 5. References to new reports on competition policy

48. In June 2004, the Competition Authority publishes its seventh Competition Report.

49. The report analyses important and current political competition problems. In 2004, the report deals with the competition intensity in the Danish Economy, predatory pricing, transparency, bundling and tying, merger control, competition in the telecommunication market, competition in the professions market etc.

50. The report also contains an annual section. Firstly, it describes the most significant decisions made by the Competition Council in 2003. Secondly, it describes the Competition Authority's assignments concerning state aid, procurement and regulation of energy prices.

51. The Competition Authority also published "Competition in Denmark (Annual Report)", which reports on the objectives, results and organisation of the Authority. Besides, it contains an analysis of the results, which the Authority has achieved in the field of competition, energy, procurement, state aid, etc.

52. In 2003, the Authority also published reports on:

- Report on Danish pilotage services
- Municipal rent out of sports centres
- The merger between Nykredit and Totalkredit